

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

HUNTINGTON DIVISION

MARK DAMRON, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 3:10-0698

DAN O'HANLON, Judge, et al.,

Defendants.

ORDER

This action was referred to the Honorable Cheryl A. Eifert, United States Magistrate Judge, for submission to this Court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge has submitted Findings of Fact and recommended that:

1. Plaintiff's Complaint (Docket No. 2) be **DISMISSED** with prejudice pursuant to the screening provisions of 28 U.S.C. § 1915A;
2. Plaintiff's application to proceed without prepayment of fees or costs (Docket No. 1) be **DENIED** pursuant to 28 U.S.C. § 1915(e)(2)(B);
3. Plaintiff's Motions to Amend (Docket Nos. 6, 16, 25, and 26) be **GRANTED**, and the Amended Complaints be summarily **DISMISSED** with prejudice pursuant to the screening provisions of 28 U.S.C. § 1915A and 28 U.S.C. § 1915; and
4. All remaining motions in this case (Docket Nos. 9, 13, 17, 18, 22, 27, 33, 34, 35, 36, 37, 38) be **DENIED** as moot in light of the dismissal of plaintiff's Complaint and Amended Complaints.

Proposed Findings and Recommendation, at 18 & 19. Plaintiff Mark Damron raises only two objections to the proposed Findings and Recommendation. The Court reviews those objections de novo.

As recited by the Magistrate Judge, Plaintiff was convicted by jury in state court in March of 2005 of first and second degree arson. Thereafter, Plaintiff was sentenced to twenty years imprisonment on the first degree arson charge and ten years imprisonment on the second degree arson charge. The sentences were ordered to run consecutive to one another.

Plaintiff challenged his convictions and, ultimately, the West Virginia Supreme Court overturned his second degree arson conviction in 2008. *See Damron v. Haines*, 672 S.E.2d 271, 281 (W. Va. 2008). However, Plaintiff's first degree arson conviction has been upheld by both the West Virginia Supreme Court and recently by this Court when it denied his Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. *See Damron v. Fox*, 3:09-0098 (S.D. W. Va. 2010). Plaintiff filed this action pursuant to 42 U.S.C. § 1983 seeking relief for being sentenced to ten years imprisonment on the second degree arson charge.

In the Findings and Recommendation, the Magistrate Judge found that Plaintiff was not deprived of a federally protected civil right under his conviction for second degree arson because he never began serving that sentence. Plaintiff objects to this finding because he contends that his twenty year sentence also is "illegal" and, in any event, he was eligible for a parole hearing on the remaining twenty year sentence in five years. First, the Court finds that Plaintiff's twenty year

sentence has never been declared invalid. Thus, Plaintiff's objection on that basis is without merit. Second, even if Plaintiff is correct that he was eligible for a parole hearing on his twenty year sentence after five years, Plaintiff is still serving the twenty year sentence, despite the fact his ten year sentence was overturned in 2008, as the Parole Board has not granted him release on the twenty year sentence. Accordingly, the Court agrees with the Magistrate Judge that Plaintiff never served any of the ten year sentence for which he currently seeks damages, and the Court **DENIES** his objection to that finding.

Plaintiff's second objection is to the Magistrate Judge's finding that he fails to state a claim against the sentencing judge, the Honorable Dan O'Hanlon. However, as stated by the Magistrate Judge, Judge O'Hanlon cannot be sued in his official or individual capacity under § 1983 because he is immune from suit. Plaintiff makes no arguments which overcome the fact Judge O'Hanlon is protected by immunity. Therefore, the Court **DENIES** Plaintiff's objection.

Accordingly, having reviewed de novo the pleadings and Plaintiff's objections, the Court **DENIES** Plaintiff's objections and **ADOPTS AND INCORPORATES HEREIN** the Magistrate's Judge's Findings and Recommendation.

The Court **DIRECTS** the Clerk to forward copies of this written opinion and order to all counsel of record, and any unrepresented parties.

ENTER: November 5, 2010

A handwritten signature in black ink, appearing to read 'Robert C. Chambers', is written over a horizontal line.

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE